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Supreme Court, U.S.
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No. 99-1429

IN THE

Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition For a Writ Of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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REPLY BRIEF

MARK R. HASKELL
BRUNENKANT & HASKELL, LLP
805 Fifteenth Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 408-0700

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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REPLY BRIEF
IN SUPPORT OF PETITION FOR CERTIORARI

INTRODUCTION AND SUMMARY

In their oppositions to the petition for certiorari filed in this case, respondents make much of the fact that the petitioning natural gas producers recovered from consumers some amounts by which Kansas' *ad valorem* tax exceeded the maximum lawful price of gas under the Natural Gas Policy Act of 1978 ("NGPA"). The only question, respondents say, is whether petitioners must refund all unlawfully collected amounts, plus full prejudgment interest, and what could possibly be unfair or controversial about that? In their glib presentation, respondents fail to pay even a moment of respect to the fundamental unfairness inherent in this case. In both 1974 and 1986, FERC determined that natural gas producers *lawfully could* recover from consumers the amounts by which Kansas' *ad valorem* tax exceeded the maximum price of gas under the NGPA. The petitioning producers collected such amounts for almost 20 years. Then, in 1993, FERC reversed itself, subjecting producers who had acted pursuant to its clear rulings to millions of dollars in wholly unexpected liabilities and, as a direct result of FERC's mistake and delays, to enormous liabilities for prejudgment interest.

FERC initially sought to mitigate the effect of its errors by exercising its remedial discretion to limit the retroactive effect of its ruling. But the D.C. Circuit reversed, holding that, in exercising its remedial discretion with respect to retroactivity, FERC had no authority to consider equitable factors other than detrimental reliance. FERC was forbidden to consider other traditional, equitable factors, such as the fundamental fairness of ordering a fully retroactive remedy, including prejudgment interest, against parties who had acted innocently and pursuant to the agency's authorization. And, rather than remanding the question of detrimental reliance to FERC for definition and application, the court of appeals simply held that producers had not proven detrimental reliance, although they had collected excess Kansas tax amounts with FERC

approval for 19 years, had necessarily made many business judgments as a function of the price that could lawfully be obtained for their product, and had paid royalties and a tax-on-tax imposed by Kansas expressly because they were entitled to recover the excess tax amounts. As a result, FERC was judicially barred from exercising its statutorily conferred remedial discretion and "compelled" to issue a fully retroactive remedy, including full prejudgment interest. See Davis & Pierce, Jr., *Administrative Law Treatise*, §11.4, at 358 (3d ed. Supp. 1999).

The court of appeals held that the agency lacked discretion to limit retroactive relief, including prejudgment interest, based on traditional equitable considerations, even when the agency established and was applying an entirely new rule of law in an adjudication and was exercising remedial discretion conferred by law. This petition thus squarely presents the important question whether a federal agency is entitled to *Chevron* deference when it determines the extent of retroactive relief in such circumstances. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The D.C. Circuit's decision in this case conflicts with the decisions of other courts of appeals holding that when a federal agency abruptly departs from clear past precedent and establishes a new rule, the agency has broad equitable authority with respect to the extent of retroactive relief. See Pet. 18-20. It also directly conflicts with decisions of this Court on the specific question of discretion with respect to the imposition of prejudgment interest. *Id.* at 20-24. The question and conflict arise in a case where hundreds of millions of dollars of liabilities have been imposed upon petitioners for conduct that was, and had been for more than a decade, expressly authorized by the federal agency when it occurred. Certiorari review is warranted.

ARGUMENT

A. *The D.C. Circuit's Decisions Create A Rigid Legal Rule That Forbids Agencies To Consider Several Traditional Equitable Factors In Determining Whether To Award Retroactive Relief, Including Prejudgment Interest.*

Respondents contend that the D.C. Circuit's decisions do not establish the legal rules that the petitioning producers ask this Court to review and that the legal rules applied in the decision are unexceptional, correct, and of little importance. Opposition of Private Respondents at 7-9 ("Opp."); Gov't Opp. 7-8. Respondents mischaracterize petitioners' argument and the court's decisions.

In this case, two decisions of the court of appeals have combined to impose liabilities of hundreds of millions of dollars on natural gas producers for conduct that was expressly authorized by FERC. The court of appeals held that FERC had to award *full* retroactive relief, including prejudgment interest, even though it had abruptly departed from an established, clear rule of law in an adjudication and was applying its new rule retroactively. See Pet. 16. Contrary to respondents, it is a substantial departure from *Chevron* and principles of *Chevron* deference so narrowly to restrict a federal agency's remedial discretion under a federal statute authorizing that agency to "perform any and all acts. . . as it may find necessary or appropriate to carry out its functions" and to make equitable adjustments to refund payments "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens," 15 U.S.C. §§ 3411(a), 3412(c). FERC initially reasonably interpreted these provisions to give it remedial discretion *not* to order fully retroactive refunds based on its judgment about the relevant equities—*i.e.*, the absence of blameworthiness and FERC's responsibility for the legal error and delay—arising from its abrupt departure from a clearly established rule. In addition, FERC deter-

mined that its general remedial discretion provided it with authority to limit the extent of retroactive relief. But the court of appeals placed these considerations off-limits *and* defined and applied the concept of detrimental reliance for FERC. Indeed, FERC stated that, under the court's decision, it lacked discretion to consider traditional equitable factors and to define detrimental reliance and that it was *compelled* to order full retroactive relief, including prejudgment interest. See *Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999). Thus, although the private respondents are unable to perceive it, Opp. 8, FERC certainly recognized that the court of appeals had created an exception to *Chevron* deference when agencies craft retroactive remedies for past violations of new legal rules.

Petitioners submit that this holding is both wrong and of profound importance for administrative law. There is no basis in *Chevron* or elsewhere in law for cabining agencies' remedial discretion with respect to the appropriateness of retroactive relief. Moreover, we showed in the petition that considerations of innocence and governmental responsibility for both error and delay are relevant to whether full retroactive relief should be ordered when the government abruptly departs from an established rule of law. See, *e.g.*, Pet. 12 (citing cases and other authority). At the very least, it was certainly reasonable for FERC to conclude that these considerations were material to whether full retroactive relief, including prejudgment interest, were warranted.

B. *The Decisions At Issue Have Consequences That Reach Well Beyond This Case.*

Although the private respondents say it "cannot be taken seriously," Opp. 9, the bases for the assertion that the decision is important are substantial and quite plain. The petitioning producers have incurred hundreds of millions of dollars in unexpected liabilities for blameless conduct. More broadly, many federal agencies have remedial statutes which provide

them with remedial discretion akin to that exercised by FERC here. See Pet. 13 & n.3. Far from being extraordinary, FERC's remedial authority both under the NGPA and as a general matter are run-of-the-mill. If FERC lacks discretion with respect to retroactive relief when abruptly departing from established law, then so, too, do agencies administering many other statutory schemes. Finally, it cannot be denied—and respondents do not attempt to deny – that a D.C. Circuit decision in this area of law has a disproportionate impact. See *id.* at 19-20.

The private respondents attempt to persuade the Court not to address the conflicts and the important issues raised by this case on the ground that "[the] holding is confined to the context of the specific statute at issue . . . —the NGPA," and that the NGPA has been repealed. Opp. 9; see also Gov't Opp. 8. For two reasons, this is a red herring. First, in the decisions under review, the D.C. Circuit constrained FERC's general remedial discretion as well as its discretion under the NGPA. See, *e.g.*, *Public Serv. Co.*, 82 FERC ¶ 61,058, at 61,214 (1998) ("[t]he Commission continues to hold that the *Public Service* decision forecloses the grant of an across-the-board waiver of interest on all refunds, *regardless of whether the Commission proceeds under its general remedial discretion or under section 502(c) of the NGPA*") (emphasis supplied). Second, as noted, numerous federal agencies administer statutes that give them broad remedial discretion, discretion akin to that in the NGPA. The broad language of the NGPA's remedial provisions is quoted above; and, on any fair reading, it is not subject to any limiting construction. Far from being only of "historic interest," Opp. 2, the questions raised by the petition will arise routinely.[1]

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[1] The private respondents' second argument against certiorari review is that the challenged holding of the court of appeals' decisions has thus far been cited only three times and each time "in support of an unremarkable

The private respondents further argue that, if this case were so important, the United States would have sought certiorari review of *Public Service Co.* In many cases, however, the United States opposes certiorari review of a decision which may be worthy of review for strategic reasons. Petitioners, who have incurred liabilities in the hundreds of millions of dollars, have no such luxury. The questions raised here are important, and the subject of conflict; the context ensures a thoughtful, adversarial presentation. It is this Court's assessment of the worthiness of an issue for review, not the Solicitor General's, that is significant.

Finally, the government observes that FERC denied the waiver of prejudgment interest under its "blanket" wavier provision, insinuating that FERC could always grant partial waivers to individual producers on the ground that they were

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proposition." Opp. 10. Examination of the three relevant citations, however, reveals that the decisions at issue are and will continue to be influential. In *Exxon Co., U.S.A.* v. *FERC*, 182 F.3d 30, 48-49 (D.C. Cir. 1999), the court relied on *Public Service Co.* in holding that FERC had abused its discretion in denying full retroactive refunds as a result of a successful legal challenge to a rate and remanded for further proceedings with a strong admonition about the presumption in favor of full retroactivity. In *Washington Water Power Co.* v. *FERC*, 201 F.3d 497, 503 (D.C. Cir. 2000), the court upheld *FERC's approval* of a fully retroactive settlement because the parties had *failed* to establish detrimental reliance on the terminated policy. Finally, in *Microcomputer Technology Institute* v. *Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998), the court agreed with a defendant that it had showed detrimental reliance on a past policy and therefore that the agency's change of policy should not be fully retroactive.

Respondents' heavy reliance on *Connecticut Valley Electric Co.* v. *FERC*, No. 98-1294, 2000 WL 347453 (D.C. Cir. Apr. 14, 2000), is similarly misplaced. In that case, FERC found, and the court agreed, that the parties affected by the rule change had relied to their detriment on the old rule. *See id.* at *5, *7, *8 (describing FERC's finding, affirmed by the court, that the affected parties' had "settled expectations" and had incurred "'obligations and responsibilities under such executed . . . sales contracts'") (alteration omitted).

innocent actors in the wrongful collections or that FERC's delay and error were to blame for their liability for prejudgment interest. Gov't Opp. 9; see also *id.* at 11. This implicit contention is utterly without merit. The petitioning producers requested equitable adjustments to prejudgment interest as "necessary to prevent special hardship, inequity, or an unfair distribution of burdens" under NGPA section 502(c), 15 U.S.C. § 3412(c), on these precise grounds. FERC denied the request, holding that the D.C. Circuit's decision in *Public Service Co.* v. *FERC*, 91 F.3d 1478 (D.C. Cir. 1996), *precluded* relief from a fully retroactive remedy on such grounds. See *Public Serv. Co.*, 82 FERC at 61, 214 ("[t]he Commission continues to hold that the *Public Service* decision forecloses the grant of an across-the-board waiver of interest on all refunds"). Thus, under the court of appeals' decisions, FERC can no more grant relief on these grounds in individual hearings than it can in the section 502(c) proceeding. Its equitable discretion has been eliminated by the rule of law established by the D.C. Circuit.

C. *The Decisions Below Conflict With Decisions Of This Court And The Courts Of Appeals.*

The private respondents first attempt to distinguish conflicting decisions of the courts of appeals from the decisions at issue solely on the ground that they do not involve the NGPA. Opp. 11-12. See also Gov't Opp. 11-12. We have already shown that the remedial provisions of the NGPA are akin to those of numerous federal statutes giving federal agencies broad remedial discretion. Moreover, contrary to respondents' implication, the NGPA itself neither *requires* nor even expressly authorizes FERC to order refunds in the circumstances presented here.[2] FERC's power arises under

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[2] The private respondents attempt to create the impression that the NGPA does so, by citing a sentence in *Public Service Co.*, stating the

the general provision authorizing it to "perform any and all acts . . . as it may find necessary or appropriate to carry out its functions" and to make equitable adjustments to refund payments "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens," 15 U.S.C. §§ 3411(a), 3412(c). Thus, respondents' attempted distinction of the cases cited in the petition has no force: Those decisions recognized federal agencies' authority not to order fully retroactive relief where, for any of a variety of reasons, it was fundamentally unfair to do so. See Pet. 18-19, 23-24. The D.C. Circuit decisions at issue, in contrast, forbid FERC to consider numerous factors plainly relevant to fundamental fairness in deciding the extent of retroactive relief that is appropriate.

The private respondents next try to distinguish cases, including cases of this Court, holding that in deciding whether to award full prejudgment interest, traditional equitable considerations such as blameworthiness and responsibility for error and delay, are relevant. Notably, however, the private respondents do not even cite, let alone attempt to distinguish, this Court's decision in *Board of County Commissioners* v.

"'the NGPA established maximum lawful prices and gave the customer a right to a refund if it was overcharged.'" Opp. 12 (quoting *Public Serv. Co.* v. *FERC*, 91 F.3d 1478, 1489-90 (D.C. Cir. 1996)). And the government, too, mistakenly conveys this impression by stating that there are "*statutory* prescriptions of the ceiling prices and provisions for refunds of overcharges." Gov't Opp. 8. In fact, although the NGPA creates an express refund obligation for interim collections, it contains no general refund obligation; it is FERC's regulations that gave customers a right to a refund for prices over the maximum ceiling price, subject to the NGPA's statutory remedial provisions which gave FERC discretion with respect to any remedy. Put differently, and as the court reviewing FERC's refund regulation stated, that right is "is subject to equitable considerations" because equitable relief from the refund obligation "is always available in appropriate cases by means of a section 502(c) adjustment." *Ecee, Inc.* v. *FERC*, 645 F.2d 339, 354 (5th Cir. 1981). *See also id.* at 354 nn.11 & 12.

United States, 308 U.S. 343 (1939) ("*Jackson County*"). There the County had innocently, but wrongfully collected taxes, and this Court allowed the affected taxpayers a refund, but denied them prejudgment interest, saying:

> Whatever may be [the County's] unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers. [*Id.* at 353.]

See also Pet. 22-23. The government only feebly states that the case involves a government party, but there is no hint in the decision that it turns upon this fact. Gov't Opp. 11. Indeed, the case strongly suggests its holding is generic. *Jackson County*, 308 U.S. at 353. The *Anadarko* holding with respect to prejudgment interest directly conflicts with this Court's decision in *Jackson County.*

The respondents' distinctions of *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (5th Cir. 1985), and *Estate of French* v.-*FERC*, 603 F.2d 1158 (5th Cir. 1979), are similarly unpersuasive. In those cases, the court found considerations of blameworthiness and delay relevant; in this case, the court specifically held, as a matter of law, that agencies may not consider such facts in deciding whether prejudgment interest should be imposed. See Pet. 23; *id.* at 21 (discussing *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 (1989) ("the degree of personal wrongdoing on the part of the defendant" is a relevant consideration in determining whether to award "prejudgment interest")).[3]

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[3] In attempting to distinguish *Osterneck*, the private respondents say that petitioners "fail[ed] to mention that in a footnote the Court made clear that 'we do not intend here to specify what factors a district court must consider when deciding under federal law whether to grant prejudgment interest.' " Opp. 15 (alteration omitted). Petitioners respectfully direct

* * * *

When a federal agency abruptly departs from a long-established rule and enforces a new one, the retroactive application of the new rule often gives rise to basic issues of fairness. Here, the petitioning producers for 19 years collected the excess Kansas *ad valorem* tax amounts pursuant to an express authorization by FERC. The court of appeals has held that, as a matter of law, FERC cannot consider the producers' blameworthiness and its own responsibility for error and delay in determining whether to award fully retroactive relief, including prejudgment interest. These decisions, which impose hundreds of millions of dollars in unexpected and unforeseeable liabilities on petitioners, are in error and in conflict with decisions of other courts of appeals and of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARK R. HASKELL
BRUNENKANT & HASKELL, LLP.
805 Fifteenth Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 408-0700

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

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* *Counsel of Record*

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the Court to page 21 of the Petition, which states: "This Court recently declined to specify all the factors to be considered in 'deciding under federal law whether to grant prejudgment interest,'" citing the footnote at issue.